80-1227

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1980

BOBBY F. TANNER, NED A. KNUTH, CAROL CAMPBELL, TOMMY CARLISLE, JOSEPH DAVENPORT, and FRANCIS UGOREK,

Petitioners,

vs.

MALCOLM McCALL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The undersigned, on behalf of Bobby F. Tanner, Ned A. Knuth, Carol Campbell, Tommy Carlisle, Joseph Davenport, and Francis Ugorek, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on September 17, 1980.

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QUESTION PRESENTED

In a political patronage case, is the burden of proof of the Petitioners to demonstrate a prima facie case met by a showing that but for the electoral defeat of the individual who appointed them to their position of employment with a governmental entity, they would have continued in the employment of the governmental entity?

In the event this petition is granted, the Petitioners reserve the right to argue two further questions, i.e., whether the Petitioners should have been reinstated to their positions of employment with the governmental agency for whom they worked, and whether the Petitioners are entitled to back pay from the date of entry of the jury verdict against the Respondent Malcolm McCall.

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Jurisdiction 1

Constitutional Provisions Involved 1

Statement of the Case 1

Reasons for Granting the Writ 5

Conclusion 11

Certificate of Service 12

TABLE OF AUTHORITIES

CASES — *Page*

Branti v. Finkel, _____ U.S. _____, 100 S. Ct. 1287, 63 L.Ed.2d 574 (1980) 1, 6

Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976) 1, 5, 6, 9

Ezzard v. U.S., 7 F.2d 808, 810 (C.A. 8 1925) 8

Gabriel v. Benitez, 390 F. Supp. 988 (D. Puerto Rico 1975), *aff'd sub nom, Riviera Morales de Benitez de Rexach*, 544 F.2d 882 (1st Cir. 1976) 6, 7

Tanner v. McCall, 441 F. Supp. 503 (M.D. Fla. 1977) 1

Tanner v. McCall, _____ F.2d _____ (5th Cir. 1980) 1

The Robert Edwards, 19 U.S. (6 Wheat.) 187, 198, 5 L.Ed.2d 238 (1821) 8

Wilkins v. Hogan, 425 F.2d 1022 (C.A. 10 1970) 8

STATUTES

28 U.S.C., §1254(1) 1

28 U.S.C., §1331 2

28 U.S.C., §1343(3) 2

28 U.S.C., §1343(4) 2

42 U.S.C., §1983 2

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Tanner v. McCall*, _____ F.2d _____ (5th Cir. 1980). The District Court issued an opinion denying a preliminary injunction, and granting the Respondent's motion for summary judgment on all but a political patronage claim, which is reported as *Tanner v. McCall*, 441 F. Supp. 503 (M.D. Fla. 1977). Thereafter, a jury trial was had on the political patronage claim. A verdict in favor of five of the six Petitioners was returned. No other opinion of the District Court is officially recorded. The opinions officially recorded are reprinted in the Appendix, commencing on pages A-1 and A-26, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered September 17, 1980. A timely petition for rehearing was filed. It was denied on October 16, 1980. The Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C., §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The principal constitutional provisions involved are under the First and Fourteenth Amendments to the United States Constitution, and involve the concept of political patronage as proscribed by this Court in the cases of *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976), and *Branti v. Finkel*, _____ U.S. _____, 100 S. Ct. 1287, 63 L.Ed.2d 574 (1980).

STATEMENT OF THE CASE

The Petitioners were employees of the Lake County Sheriff's Department until January 4, 1977.

On January 4, 1977, the Respondent here, Malcolm Mc-

Call, a Democrat, assumed the office of Sheriff of Lake County as the result of his electoral victory in general elections held in November, 1976, over incumbent Guy Bliss, a Republican.

Upon assumption of the office of Sheriff of Lake County, the Respondent Malcolm McCall failed to reappoint between twenty percent (20%) and thirty percent (30%) of the employees who had worked for Sheriff Bliss, including the Petitioners here.

The Petitioners here filed an action under 42 U.S.C., §1983, in the United States District Court for the Middle District of Florida alleging that their dismissal was an unlawful patronage practice. Jurisdiction was premised on 28 U.S.C., §§1331 and 1343(3) and (4).

At trial, the predecessor to the Respondent, under whom all the Petitioners had been employed and had worked, stated that each of them had done a "fine job". At the time he left office, the predecessor to the Respondent here had no knowledge of any reason that would suggest termination of employment with the Lake County Sheriff's Department of any of the Petitioners. (Testimony of Guy C. Bliss, TR Vol. II, 152-188.)

During the course of the campaign for the office of Sheriff of Lake County, Florida, each of the Petitioners testified that they had actively supported the political campaign of Mr. Bliss against the Respondent here. (Ugorek, TR Vol. II, 201-202; Knuth, TR Vol. III, 315; Carlisle, TR Vol. III, 359; Tanner, TR Vol. III, 392; Davenport, TR Vol. IV, 445; and Campbell, TR Vol. IV, 479.) They further testified as to how the Respondent may have been aware of their support for Sheriff Bliss. The Respondent stipulated that he assumed all employees of the Lake County Sheriff's Department supported the candidacy of his general election opponent, Sheriff Bliss.

Each Petitioner testified as to what transpired between them and the Respondent here at the time of their termination. Each of the Petitioners requested to be continued in their employment with the Department.

Mr. Ugorek stated that the Respondent told him that he had performed satisfactorily with the former Sheriff, "but he had no place for [him] in his organization." (TR Vol. II, 204.)

Mr. Knuth was told that his services would not be needed with the Respondent's organization because "there would be a

personality conflict." (TR Vol. III, 316.)

Mr. Carlisle was told that "under the circumstances [the Respondent] couldn't use [him]." (TR Vol. III, 361-362.)

Petitioner Tanner indicated that in his conversation with the Respondent, the Respondent "indicated that it had been a long four years, and it sure felt good to be back home again."[1](TR Vol. IV, 405.) He told Petitioner Tanner that he, the Respondent, had his own people that he wanted to bring in. (TR Vol. IV, 406.)[2]

Petitioner Davenport was told by Respondent McCall, "that he didn't think that he and [Mr. Davenport] could work together." (TR Vol. IV, 444.)[3]

Petitioner Campbell said:

> I was told by Sheriff McCall that he did not—he was under the impression that I had done a good job with the Lake County Sheriff's Department, but he wanted to bring his own people in and that there was no place in the Department for my services.

Other non-Petitioners whose services had also been terminated, such as Randolph Ward, were told:

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1 Respondent McCall had, prior to 1973 and the assumption that year of the office of Sheriff of Lake County by Guy Bliss, been employed by the Lake County Sheriff's Department. He had been so employed for twenty-two (22) years. Immediately prior to 1973, he was the Chief Deputy. During most of his employment, he served his father and then Sheriff, Willis McCall.

2 Many of those hired by the Respondent were former associates of Respondent McCall in the pre-1973 Sheriff's Department. Included were Don Scism, Robert Gnann, James A. Livingston, Douglas Yates, and Douglas Sewell. All were members of LEO, Lake Law Enforcement Organization, an organization founded and encouraged by the Respondent's father, Willis McCall. Sheriff Bliss discouraged membership in that organization and none of the Petitioners belonged. LEO supported the candidacy of Respondent McCall in the general election of November, 1976, for the office of Sheriff of Lake County.

3 Petitioner Davenport was replaced as Chief Correctional Officer. His replacement was Robert Gnann who had little experience in the area of Corrections. See, TR Vol. II, 88-89.

> He [the Respondent] said, "We never had any hard words or anything. We always got along fine," he said, "but I won't be able to use you in my administration." He said, "You have been a little too active."

(TR Vol. III, 259.) Mr. Ward was a registered Republican and supported Sheriff Bliss. (TR Vol. III, 260.)

Mr. Harold Underwood was a Civil Deputy under Sheriff Bliss. During the general elections campaign in 1976, he was also a candidate on the Republican party's slate for Tax Collector in Lake County. (TR Vol. III, 382.) He supported the Republican slate and Sheriff Bliss. (*Id.*) After the general election was completed, the Respondent interviewed Mr. Underwood and told him that "it looks like we were on opposite sides this time." (TR Vol. III, 385.) Mr. Underwood testified:

> And he [McCall] said that he was trying his best to get the best qualified deputies and all, and did I understand.
>
> And I said, "Yes." I said, "To the victor goes the spoils." And he said, "Yes." He said, "You know, I thought I was going to enjoy this very much." But he said, "some of the decisions I have to make are very hard decisions. And I have had to give a lot of thought to it."
>
> And I said, "Malcolm, you know whatever you do, you have to answer to the people for four years."
>
> And he said, "Yes."

(TR Vol. III, 385.)

After trial, a jury verdict in favor of the Petitioners Knuth, Campbell, Carlisle, Davenport, and Ugorek was entered against the Respondent McCall in a total amount of eighty-five thousand dollars ($85,000.00). A jury verdict in favor of the Respondent McCall, against Petitioner Tanner, who was the Chief Deputy of the Lake County Sheriff's Department under the

predecessor to Sheriff McCall, Guy Bliss, was also rendered.

The Respondent filed a motion for a new trial, and/or a directed verdict. The Petitioner Tanner also filed a motion for a new trial. The Petitioners Knuth, Campbell, Davenport, Carlisle, and Ugorek filed a motion for the entry of injunctive relief reinstating them to their positions of employment. By order rendered August 9, 1978, and an opinion of the same date, all motions were denied.

On September 9, 1978, an amended judgment in favor of Petitioners Knuth, Carlisle, Campbell, Davenport, and Ugorek was filed.

An appeal to the United States Circuit Court of Appeals for the Fifth Circuit was filed by the Respondent McCall. The Petitioner Bobby F. Tanner also filed his appeal, and cross-appeals were filed as to the denial of injunctive relief by Petitioners Knuth, Campbell, Carlisle, Davenport, and Ugorek.

On September 17, 1980, the United States Circuit Court of Appeals for the Fifth Circuit reversed the judgments for the Petitioners Campbell, Carlisle, Davenport, Knuth, and Ugorek. The denial of permanent injunctive relief was affirmed, as was the judgment against Petitioner Tanner. In taking the action that it did, the Court of Appeals concluded that the Petitioners did not meet their burden of proving that political patronage was a substantial or motivating factor in the Respondent's employment decisions.

REASONS FOR GRANTING THE WRIT

In *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976), this Court held that patronage dismissals severely restrict political belief and association. Therefore, it held that the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments to the Constitution of the United States of America. In *Branti v. Finkel*, _____ U.S. _____, 100 S. Ct. 1287, 63 L.Ed.2d 574 (1980), this Court reaffirmed the *Elrod* holding, and extended it to cover policy-making or confidential positions where the hiring authority cannot demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

In holding that patronage dismissals constitute an unconstitutional impingement on First and Fourteenth Amendment rights of governmental employees, the Court dealt in *Elrod* with a blatant case where the employer required the employees openly to change their party preference if they were to continue their employment. In *Branti*, the hiring authority attempted, belatedly, to justify the dismissals on non-political grounds. But, in *Branti*, the District Court found that the Assistant Public Defenders involved there had been satisfactorily performing their jobs as Assistant Public Defenders. In the instant case, the Petitioners had been performing their jobs in a satisfactory manner, and but for the results of November, 1976, general election for the office of Sheriff of Lake County, they would have continued their employment with the Lake County Sheriff's Department.

Nonetheless, the Court of Appeals reversed the jury verdict, contending that Petitioners did not meet their burden of proving that political discrimination was a substantial or motivating factor in the Respondent's employment decisions. The reversal was made even though Senior United States District Judge, Charles R. Scott, denied a motion for a directed verdict in favor of the Respondent.

A review of the opinion issued by the Circuit Court of Appeals would reveal a rejection of the circumstantial evidence presented by the Petitioners as to their patronage claim. Included in that evidence is testimony by the predecessor to the Respondent, Guy Bliss, that the Petitioners were doing a "fine job", and that he knew of no reason for their non-continuation in their positions of employment. The Petitioners contend that a prima facie case of patronage is demonstrated by such a showing. The jury verdict entered on the prima facie case should not have been reversed.

At least one other Circuit would seemingly concur.

In *Gabriel v. Benitez*, 390 F. Supp. 988 (D. Puerto Rico 1975), *aff'd sub nom*, *Riviera Morales de Benitez de Rexach*, 544 F.2d 882 (1st Cir. 1976), an employee who served as a Field Coordinator for Puerto Rico of a Staff Development Project, United States Department of Health, Education, and Welfare, which was funded for the training of adult educators, and who had initially been appointed for a one-year period which ended June 30, 1973, was given notice that her appointment would not

be renewed some five months after the defendant in that case assumed office as Secretary of Education. No reasons were given for the decision.

The evidence was that Gabriel had never received any notice or complaint from the Project Director or her supervisors regarding her performance. There was in the instant case no notice of any complaint evidenced of the performance of any of the Petitioners. In the case of *Gabriel*, her former supervisor stated that her work was " 'excellent' ". Here, former Sheriff Guy C. Bliss testified that the Petitioners performed in a very good fashion, or did a "fine job".

Gabriel's replacement was a member of the popular Democratic party, where she was a member of the New Progressive party. Here, the Petitioners were supporters of Guy C. Bliss, and, with the exception of Mr. Carlisle, were all Republicans. By way of contrast, the replacements for the Petitioners here were all supporters of Malcolm McCall, and all former associates of his prior to December 15, 1972. By way of contrast, they were Democrats, with the exception of one who was a Republican.

No evidence was adduced that Benitez knew Gabriel's political affiliation, although her affiliation was known by some persons at the Central Office of the Department of Education where she worked. Here, the Respondent Sheriff stated that all former employees of Sheriff Guy C. Bliss supported Mr. Bliss' election campaign for Sheriff. The Petitioners described the public way in which their affiliation with Mr. Bliss was demonstrated. Further, within the personnel files of each officer was an application form that clearly listed the political party with which they were affiliated. (TR Vol. III, 395.)

The court in *Gabriel*, *supra*, said of the evidence:

> We must carefully consider, however, the effect, if any, of the Plaintiff's failure to bring direct proof of Defendant's knowledge of Plaintiff's political affiliation. A related problem is that there is also no direct proof that Defendant acted from political motivation. If direct proof of such matters were an essential element of discrimination cases, there would be few, if any, successful civil rights cases in the books. We

believe, however, that such is not the law (citations omitted); and that circumstantial evidence is as valid in civil rights cases as in any other case before the law. By circumstantial evidence, we mean, of course, proof of the chain of circumstances pointing to the existence or non-existence of certain facts. *Wilkins v. Hogan*, 425 F.2d 1022 (C.A. 10 1970); *Ezzard v. U.S.*, 7 F.2d 808, 810 (C.A. 8 1925); *The Robert Edwards*, 19 U.S. (6 Wheat.) 187, 198, 5 L.Ed.2d 238 (1821).

The chain of circumstances herein clearly points to the missing link, which is Defendant's political motivation in her non-renewal of Plaintiff's contract. Plaintiff was hired for a three-year program; she performs her work without complaint from her supervisors; Defendant, a prominent member of the popular Democratic party, becomes Secretary of Education; thereafter, Plaintiff, a member of the New Progressive party, is eliminated from attendance at staff conferences, and is not allowed to communicate with her program directors in the mainland; Defendant "terminates" Plaintiff's employment as of June 30, 1973, and the day after, hires a member of her own party to replace Plaintiff; no reasons are given to Plaintiff for her "termination;" the three-year program continues in full force and effect after Plaintiff's departure.

It would require a stretching of credulance to the breaking point to ascribe this sequence of events to mere coincidence.

In the context of patronage dismissals, the Petitioners believe that an employee has laid a prima facie case when he has shown that, but for the election of a new hiring authority, they would have continued in their employment. Accordingly, unless the Respondent rebuts the prima facie case with substantial evidence of constitutionally permissible reasons for the non-continuation of the Petitioners in their positions of employment, the Petitioners should be reinstated to those positions,

and the jury verdict in their favor should be granted.

Unless review by this Court is had, employers will continue to discharge employees for patronage reasons, and hide behind sphinx-like silence. The shield of silence will protect the hiring authorities from liability. The practice of patronage, despite *Elrod's* holding, will be perpetuated. This Court should establish a burden of proof in patronage cases which will require of plaintiffs in such actions to show that they were employed by an office holder who was defeated in an election. Subsequent to the election their employment was terminated. Had the office holder under whom they worked not been defeated in an election, the Petitioners would have continued in their employment. The burden would then shift to the Defendant office holder, victorious candidate, to demonstrate and disclose some constitutionally permissible reason to justify the discharge. Had the Fifth Circuit Court of Appeals applied this test, it would have upheld the jury verdict won by Petitioners Ugorek, Knuth, Davenport, Carlisle, and Campbell. It would have ordered a new trial for Petitioner Tanner.

In a democratic government, and in a democratic society, secrecy is anathema. Disclosure is the by-word. The Freedom of Information Act, and the various public records acts of the states, encourage disclosure. Governments are encouraged to operate in the sunshine. But, if in patronage cases, the plaintiffs must demonstrate more than that they would have continued in their positions of employment but for a political change, before the Defendant governmental official must come forth with substantial reasons of his motivation to discontinue their services, Machiavellian deviousness will be encouraged to avoid the holding of this Court that dismissals for patronage reasons are unconstitutional under the First and Fourteenth Amendments to the Constitution of the United States of America.

Clearly, it should be the government's burden to demonstrate an overriding interest in order to validate an encroachment on protected interests. As this Court noted in *Elrod*,

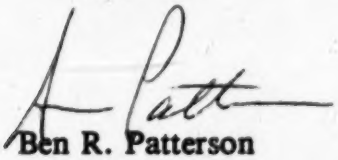
> Specifically, employees may always be discharged for good cause, such as insubordination or poor job performance when those bases, in fact, exist.

Any more rigorous burden of proof than that suggested here to be imposed on discharged employees/plaintiffs in a patronage case would implicitly condition retention of public employment on the employee's support of the "in" party, the holding of *Elrod* be damned.

CONCLUSION

This Court should review this case because the issue of patronage dismissals, and the burden of proof in such cases, is a matter of substantial public importance and concern, particularly in the aftermath of the 1980 elections. For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished, by pre-paid United States Mail, to J. Fred Parker, Jr., Esq., 318 North Monroe, P.O. Box 669, Tallahassee, Florida 32302, this 14th day of January, 1981.

Ben R. Patterson